stations." H.R. Rep. 101-682, 101st Cong., 2d Sess. 62 (1990). Recognizing a potential conflict with the public interest, Congressman Ritter proposed an amendment to the must-carry provisions of H.R. 4850 to ensure that cable system operators would not be forced to carry the signal of any commercial television station that is "predominantly utilized for the transmission of sales presentations or program length commercials." The amendment was adopted by the House Subcommittee on Telecommunications and Finance on April 8, 1992.

The Ritter Amendment is clearly constitutional. Assuming Congress decides to enact must-carry rules of the type specified in H.R. 4850, Congress need not confer must-carry status on every type of broadcast station, including those stations utilized primarily as conduits for virtually-continuous sales presentations.

Congress has broad latitude in dealing with commercial speech. In appropriate circumstances such as these, it can discriminate against commercial speech; it can discriminate between types of commercial speech; and it certainly can decide to support local programming without supporting all types of local programming

* particularly when it has not engaged in point of view discrimination

* when it continues to permit cable system operators broad discretion to carry televised-shopping broadcasters or networks

*when it leaves televised-shopping channels on a level playing field

* and when it has forged a good faith accommodation among the rights of cable system operators, speakers, and audiences.

Indeed, to saddle cable system operators with a forced regime in which televised-shopping stations are coercively granted <u>privileged</u> access raises constitutional questions that would seriously imperil must-carry legislation.

DISCUSSION

[redacted]

the sellers discussed matters such as how to be financially responsible and how to run an efficient home. The Court observed that "[n]o law of man or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares,"[1] The Court easily concluded that the Tupperware party was an exercise in commercial speech:

> "Including these home economics elements no more converted [the seller's] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. As we said in Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67-68 (1983), communications can 'constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. * * *'"[2]

Whether intermittent conversation on a televised-shopping station is about recipes, home economics, or even discussions of important public issues, the fact is that a station predominantly utilized for the transmission of sales presentations is engaged in commercial speech and is subject to the commercial speech doctrine.

As the Court stated in Fox, that doctrine does not afford commercial speech full First Amendment protection:

> "Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of first

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[1]. 492 U. S. at 474.

[2]. Id. at 474-75.

amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'[3]

Thus, even though content regulation of non-commercial speech for the most part is permitted only under extraordinary circumstances, the standards involving commercial speech are far more relaxed.

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) is an important case in point. San Diego enacted an ordinance that imposed substantial restrictions on the display of outdoor advertising signs. The ordinance permitted onsite commercial signs, but with few exceptions prohibited noncommercial signs and offsite commercial signs.[4] The Court held that San Diego could ban commercial billboards without banning non-commercial billboards and that it could ban off-site commercial billboards without banning on-site commercial billboards. Thus government could favor noncommercial speech over commercial speech and some forms of commercial speech over others.[5]

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[3]. 492 U.S. at 477 (emphasis added), quoting Ohralik v. Ohio Bar Ass'n., 436 U.S. 447, 456 (1978).

[4]. Thus a market could advertise itself and its products on the property where the market stood, but not off the site of the market, e.g., down the block.

[5]. San Diego was not similarly free to favor commercial speech over noncommercial speech. White, J., joined by Stewart, Marshall, and Powell, JJ., found the ordinance defective first, because it discriminated against noncommercial speech (permitting commercial signs on business sites while prohibiting non-commercial signs) and second, because it discriminated between types of noncommercial speech (making exceptions for signs involving governmental functions, time/weather/news public service signs, and temporary political campaign signs). Brennan and Blackmun, JJ., concurred on different grounds.

The Court again recognized the lesser degree of protection for commercial speech and observed that so long as substantial interests were furthered in accord with constitutional prerequisites,[6] the ordinance was constitutional. As Justice White explained, that test was easily met:

The Court made it clear, however, that if the statute's severability provision was interpreted to prohibit offsite commercial signs while permitting onsite commercial signs and noncommercial signs generally, the First Amendment did not stand in the way. See White, J., joined by Stewart, Marshall, Powell, and Stevens, JJ., id at 493-512. Stevens, J., joined those aspects of the opinion dealing with commercial speech, but thought White, J., was overly protective of noncommercial speech.

[6]. The language most frequently cited is that appearing in Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566 (1980). Government regulation of commercial speech is permitted if the regulation "directly advances" "substantial" governmental interests by "means not more extensive than is necessary to serve" the governmental interest. The latter part of the test has been subject to varying interpretations. Despite several prior decisions stating a view more protective of commercial speech, Board of Trustees v. Fox, supra, at 480, concluded that all the holdings of the cases actually required was a reasonable fit between the legislature's ends and the means chosen to accomplish those ends:

> "What our decisions require is a '"fit" between the legislature's ends and the means chosen to accomplish those ends,' [citing Posadas, 478 U.S. at 341] - a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' [citing In re R.M.J., 455 U.S. 191, 203 (1982)]; that employs not necessarily the least restrictive means, but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within these bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed."

In other words, the least restrictive means test or a reasonable facsimile is no longer required. Over the years, if anything, the test for the protection of commercial speech has become less demanding than it was at the time of Metromedia.

"* * * San Diego has obviously chosen to value one kind of commercial speech -- onsite advertising -- more than another kind of commercial speech -- offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance -- onsite commercial advertising -- its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise -- as well as the interested public -- has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted."[7]

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[7]. Id. at 512 (emphasis added). For cases following Metromedia, see, eg., Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988); Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987); Major Media of the Southeast v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986); National Advertising v. Downers Grove, 561 N.E.2d 1300 (Ill.App. 1990). See also Ackerly Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513, 522 n. 16 (1st Cir. 1989)(citing Naegele, supra with approval).

Similarly, it does not follow from the fact that government would require cable system operators to carry broadcast stations that contain commercial advertising mixed in with regular programming that it must require cable system operators to carry hoe shopping stations predominantly utilized for the transmission of sales presentations or program-length commercials.

Indeed, it is not even clear that the Ritter Amendment would have to meet the kind of test applied in Metromedia. Metromedia involved a ban of commercial speech on offsite billboards. The Ritter Amendment bans no speech. It merely refuses to give predominantly-commercial broadcasters the extraordinary benefits of must-carry.[8]

Another significant case indicating the low level of protection for commercial speech is Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, supra. In Posadas, a gambling casino in Puerto Rico objected to legislation that prohibited gambling casinos from advertising to Puerto Rican residents. Puerto Rico permitted other forms of gambling to its residents including advertising for horse racing, cockfighting, and the lottery. One gets the impression that some lobbies were just stronger than others. Nonetheless, even without legislative findings, the Court upheld the Puerto Rican legislative scheme.

The one circumstance in which commercial speech has been afforded meaningful protection has been when government attempted to suppress a particular truthful message. Most of those cases have involved attorney advertising. For example, in the most recent case, Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S.Ct. 2281 (1990) invalidated a rule prohibiting an attorney from stating on his letterhead that he had been certified by a nationally prominent organization. Even that decision was 5-4 and two of the Justices in the majority (Brennan and Marshall, JJ.) have since resigned from the Court.

[8]. Thus the appropriate analogy might be to Rust v. Sullivan, 59 U.S.L.W. 4451 (U.S. May 23, 1991). The Court there held that government could subsidize the giving of advice about family

But assuming the Ritter Amendment were treated as a regulation of commercial speech, substantial interests would support it. Congress is entitled to the view that the interest in sponsoring local news and diverse programming which it believes outweighs the free speech interests of the cable system operators is not of similar weight when a broadcast station used predominantly for commercial speech is involved. The Ritter Amendment leaves to the cable system operator the discretion to determine whether to carry a health channel, CSPAN, CSPAN II, or other diverse fare such as movies, sports, music, or specialized presentations aimed at individual segments of the national audience -- or a televised-shopping channel. It would be singularly odd if the First Amendment were read to require government to discriminate in favor of commercial speech.

Indeed, a must-carry bill that did not include the Ritter Amendment would itself present serious constitutional problems. In striking down previous must-carry legislation, Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452 (D.C.Cir. 1985), cert. denied, 476

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planning while excluding the use of its benefits for information about abortion. Rust is an enormously controversial decision given that abortion is a fundamental constitutional right, that poor patients are in danger of being deprived of information and perhaps even deceived, and that the state is seen to be intruding on the practice of medicine. One need go nowhere near as far as Rust to recognize that government can promote diverse programming without promoting commercial speech. Government can make value choices in defining a curriculum, in selecting books in a library, in establishing the National Endowment for Democracy, and in a multitudinous array of activities. Just as government can refuse to include commercials in public schools, it can refuse to include televised-shopping channels in must-carry legislation. See generally M. Yudof, When Government Speaks (1983); Shiffrin, Government Speech, 27 UCLA L. Rev. 565 (1980).

U.S. 1169 (1986) recognized that substantial First Amendment interests were at stake. The Court noted that the rules were "explicitly designed to '[favor] certain classes of speakers over others.'" Id. at 1451. That kind of favoritism was seen to impinge not only on the constitutional interests of cable programmers and their intended audiences, but also constituted a deep intrusion into the editorial autonomy of cable system operators. So understood, must-carry rules must at the very least meet the requirements of United States v. O'Brien, 391 U.S. 367 (1968)[9] and may ultimately be required to meet even more stringent requirements.

Although there is constitutional controversy about what First Amendment test benefits cable system operators, it is clear that impositions upon cable system operators have been looked at with substantial care, and must-carry provisions have twice been invalidated. See Quincy, supra; Century Communications Corp. v. FCC, 835 F.2d 292 (D.C.Cir. 1987), clarified, 837 F.2d 517 (D.C.Cir. 1988), cert. denied, 108 S.Ct. 2014 (1988). Among other things, Quincy objected to the fact that the must-carry rules "indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable system operator." 768 F.2d at 1460. See also Century Communications, 835 F.2d at 295.

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[9]. O'Brien requires a showing that legislation furthers a substantial governmental interest by means no greater than essential to further that end.

As the Seventh Circuit recognized in Chicago Cable Communications v. Cable Comm'n, 879 F.2d 1540, 1550 (1989), the "important qualities embodied in the term 'localism'" include community pride, cultural diversity" and the like. Nationally-broadcast commercial speech hardly fits the associations connoted by the term localism. Even if commercial speech fit the conception

there has been no showing that the inclusion of televised-shopping stations in must-carry is at all important.

For example, if cable system operators were not required to carry stations that fall within the scope of the Ritter Amendment in cities like Boston, they would still carry network stations or affiliates as well as independent stations including at least one public broadcasting station. It is hard to believe that courts will hold that the autonomy of cable system operators, the rights of cable programmers, and the rights of audiences can all be infringed for the incremental dose of localism provided by the relatively-insignificant "local" programming of a station predominantly utilized for the retransmission of sales presentations or program length commercials. Localism is a respectable interest; it is not a respectable obsession. The judges who have previously considered must-carry legislation have exhibited no signs of sharing any such obsession.

CONCLUSION

Commercial speech has always been a stepchild in the First Amendment family. Indeed, for most of our history, speech proposing a commercial transaction has been afforded no First Amendment protection; it has never received generous First Amendment protection. The Ritter Amendment denies legislated appropriation of scarce cable channels to serve as a conduit of commercial speech at the expense of those competing for the same channel capacity to

propagate opinion. This is in keeping with our constitutional traditions.

Indeed, the Ritter Amendment strengthens the constitutional case for must-carry legislation. It shows that Congress has appropriately considered the rights and interests of cable system operators without blindly pursuing a distorted conception of localism. It shows Congressional sensitivity to long recognized constitutional values.

Must-carry rules have twice been declared unconstitutional. If H.R.4850 is passed, must-carry will be challenged again. Again it will be claimed that government is wrongly substituting its conception of good speech for that which would be chosen in the